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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

TIMOTHY J. McGREEVY
Dana, Golden, Moore & Rasmussen
131 North Main Avenue
Sioux Falls, SD 57102
Telephone: (605) 336-1730

Court-appointed Counsel for Respondent

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him,; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny

to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this statement of the case, respondent will attempt to limit himself to points which are overlooked or misstated in the brief of the petitioner.

There are four separate transcripts that contain the testimony in this matter. The state pretrial motions, and the state trial are in the transcript referred to as "Trial Transcript." The testimony from the state preliminary hearing is contained in a transcript referred to as "Preliminary Hearing Transcript." Two evidentiary hearings were held in the United States District Court, and they are referred to as "District Court Evidentiary Hearing Transcript #1 or #2."

By the time the detectives from Sioux Falls traveled to Green Bay, at the end of September, 1973, to interrogate and transport respondent, he had become the prime suspect in the death of Hoff. (Trial Transcript 108-109) In fact, it does not appear that the detectives in the interrogations so much as asked respondent a single question relating to any alleged crime other than the Hoff death.

The record indicates that the interrogation in this case took place in three separate phases. The first began at about 9:45 a.m. on October 1, 1973. This interrogation took place in the Green Bay Police Department, to which respondent was transported in the company of several law officers, from the jail where he had been lodged. (Preliminary Hearing Transcript 23, 46) This interrogation was conducted by Detective Green, and began with Green giving respondent his *Miranda* rights. During that interrogation, respondent

made no incriminating statements. Green, during this questioning, asked respondent ". . . if he was responsible for the death of Joyce Hoff, . . ." The respondent replied ". . . he'd rather not answer that until he talked to Steve." (Preliminary Hearing Transcript 49-50) In addition, Green told respondent that "X" number of people had taken and passed a polygraph test concerning the matter and asked if he'd care to submit to such an exam. Respondent indicated he'd like to talk to Steve before answering that question. (Preliminary Hearing Transcript 37)

The "Steve" referred to was the Sioux Falls attorney retained by respondent's mother to represent him. The detectives in Green Bay well knew that the respondent was represented by counsel in connection with the homicide at the time of the interrogation in Green Bay and during the car trip to Sioux Falls. (Preliminary Hearing Transcript 28-30)

This first phase of the interrogation lasted about one hour forty-five minutes, ending at about 11:45 a.m. (Preliminary Hearing Transcript 48)

The second interrogation began at about 4:30 p.m., in the sheriff's office in Green Bay. This interrogation was conducted by Detectives Green and Skadsen. No *Miranda* rights were given to respondent prior to or during this second interrogation. (District Court Evidentiary Hearing Transcript #1 76-79)

During this second session, the prime questioner was Detective Skadsen. (Preliminary Hearing Transcript 52) Skadsen apparently went over the entire matter in his questioning. (Preliminary Hearing Transcript 38) Green asked only one question - was the death of Joyce Hoff intentional or accidental. (Preliminary Hearing Transcript 37-39) According to Green, to that question respondent replied, "accidental," and "I don't want to talk about it anymore until I talk to

Steve." (Preliminary Hearing Transcript 39) This was the first statement allegedly made by respondent which implicated him in the death of Hoff. (District Court Evidentiary Hearing Transcript #1 80)

The next morning, October 2, 1973, the third interrogation session began at about 9:00 a.m. The detective and a deputy picked respondent up to take him to Sioux Falls. Apparently respondent had waived extradition under Wisconsin law. (State Court Record, Page 711, Affidavit of Skadsen)

As soon as the group were all in the car for the drive to Sioux Falls, a trip of at least 500 miles, respondent was advised of his *Miranda* rights. Questioning began almost immediately. (District Court Evidentiary Transcript #1 83-84) The purpose of the questioning was to elicit further incriminating statements from respondent, and began with a review of the alleged incriminating statement of the prior day. During the course of the all-day drive, the conversation drifted to different subjects, so that the direct questions regarding the Hoff death were intermittent. (District Court Evidentiary Hearing Transcript #1 85) The afternoon of October 2, nearing Sioux Falls, it is alleged that the respondent said "taking a human life is so useless." (Trial Transcript 161-162) Green then told respondent he'd feel better if he got if off his chest. (Trial Transcript 477, 522) The detectives then allegedly questioned respondent about the death and allegedly respondent provided incriminating statements which were admitted in evidence at trial. (Trial Transcript 43-45, 83-84, 86-87, 121, 123, 481-482, 456) It was after allegedly obtaining these statements that the detectives for the first time acknowledged to respondent that they knew he had an attorney waiting back in Sioux Falls, and that the attorney wouldn't want him to give a written statement. (Preliminary Hearing Transcript 43-45, 84)

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit Court of Appeals in connection with this matter may be affirmed without reliance on *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A proper application of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by itself fully justifies the result reached in the Eighth Circuit.

If a decision in this matter favorable to respondent depends upon the application of *Edwards v. Arizona, supra*, respondent believes that it is not necessary to apply traditional rules governing retroactivity, as Edwards did not in respondent's view establish a new constitutional principle of criminal procedure.

If one assumes that the retroactivity of *Edwards* must be addressed, respondent submits that because *Edwards* in essence only provides a means to insure that rights guaranteed by *Miranda* are in practice honored, and because the right to counsel is so basic to our system of justice, that *Edwards* should be given retroactive application in this case.

Respondent further argues that whether *Edwards* is deemed applicable in this matter or not, respondent believes that under no applicable standard has the petitioner demonstrated appropriately that there was a valid waiver of the right to counsel in this case.

ARGUMENT

I.

THE ALLEGED INCRIMINATING STATEMENTS AT ISSUE WERE OBTAINED IN VIOLATION OF THE PRINCIPLE ANNOUNCED IN *MIRANDA V. ARIZONA*.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court established certain principles regarding police interrogation of criminal suspects. In that case, the Court held, *inter alia*, that a criminal suspect must be advised of his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation and that:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.
>
> *Miranda, supra*, at 474.

In *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975), the Court addressed the matter of the applicability of *Miranda* to successive interrogations of a suspect. *Mosley* dealt specifically with a suspect's invocation of his right to remain silent, rather than the right to counsel. The Court in *Mosley* made it clear that with respect to a request for counsel, the procedure is detailed in *Miranda, supra*, at 101 (Footnote 7). The *Mosley* case itself is nonetheless instructive. In that case the suspect was questioned about a robbery, after being given *Miranda* rights. The suspect indicated he wished to remain silent. Later that same

day, after the suspect had been lodged in jail, another detective questioned the suspect about an unrelated homicide.

This Court found Mosley's confession to be admissible, because (1) the second interrogation by itself complied fully with *Miranda*; (2) Mosley's right to cut off questioning was fully honored in the first interrogation; (3) full *Miranda* warnings were given before the second interrogation; and (4) the second interrogation related to a distinct offense.

In the case now before this court, *Miranda* rights were given before the first phase of interrogation. During that interrogation the right to counsel was invoked, and questioning ended. No incriminating statements were made. Some four to five hours later, during which time respondent remained in jail, the questioning resumed. Significantly, no *Miranda* rights were given before this second phase of interrogation. The second phase involved two detectives, one of whom had conducted the earlier questioning. It is an understatement to say that the detectives failed "to scrupulously honor" the request for counsel. The detectives just plain ignored the request, conveying most certainly to the suspect the message that his request for counsel had fallen on deaf ears.

Further, the request for counsel at the end of the first interrogation can be read as a two-fold request, involving also the right to remain silent. The distinctions between this case and *Mosley*, on the facts, are obvious. In this case, the second part of the interrogation concerned the *same* alleged crime; it was conducted in part by the same detective; it was not accompanied by fresh *Miranda* rights; the second interrogation, standing alone, would not pass muster under the *Miranda* case. At the end of this second, unlawful interrogation, the first incriminating statement was allegedly obtained. The right to counsel was then invoked again, and questioning

stopped for a time. The District Court in its Memorandum Opinion found that this second phase violated *Miranda,* but held that the error was harmless. (Joint Appendix 64-65).

The questioning resumed at 9:00 a.m. the next morning. By then, the detectives had the "foot in the door" in that respondent had allegedly incriminated himself in the death during the second phase of interrogation the prior day. It can be surmised that by the time the car trip to Sioux Falls began, the detectives may well have seen that ultimate success in the interrogation was near at hand. They, by then, had the suspect allegedly admitting some involvement in the death, and an opportunity to interrogate the suspect off and on for the duration of a 500 mile car trip in an exceedingly coercive atmosphere.

The third phase of the interrogation, that which occurred in the car, may be compared to that which occurred in *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). In *Brewer,* the authorities engaged in a "wide-ranging conversation" during a long car trip, which resulted in a confession being obtained. *Brewer, supra,* at 392.

The Eighth Circuit Court of Appeals in this matter interestingly held that some comments attributed to respondent *after* completion of the car trip from Green Bay were inadmissible based on the "fruit of the poisonous tree" doctrine. *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The same analysis can be applied as between the alleged incriminating statement made during the second interrogation, and the "full confession" alleged to have been obtained in the third, and last interrogation. But for the unlawful second interrogation, the first alleged incriminating statement would in all likelihood have never been made, and in turn making the results alleged to have been obtained in the last interrogation highly suspect.

In *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939), the Court held that the government may not make derivative use of evidence gained illegally. Seen in the context of this case, it is clear that the "full confession" alleged to have been obtained in the third interrogation owes its genesis to and was derived from the alleged incriminating statement obtained in the unlawful second interrogation. On this basis alone, the Eight Circuit should be affirmed, though admittedly on a basis different than the one expressed by that Court.

The situation in this case is somewhat similar to that which existed in *Westover v. United States,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because the second part of the interrogation in this case was not preceded by *Miranda* warnings, all that followed was tainted. When *Miranda* rights were given before the third part of the interrogation, from respondent's point of view that was like closing the barn door after the cows have gotten out. By the time warnings were given before the third part of the interrogation, the detectives felt they had their case made, as an incriminating statement had already been elicited.

At a previous point in this brief, a quotation from *Miranda* was set forth. Here, that quotation is restated, with parenthetical comments relating to this case interspersed. The court in *Miranda, supra,* at 474, held:

> If the individual states that he wants an attorney [which respondent did on at least three occasions], the interrogation must cease until an attorney is present. [The interrogation was not stopped when counsel was requested; instead, the interrogation was interrupted after the first request, only to be resumed without so much as a fresh set of *Miranda* rights, and an attorney was not present]. At that time, the individual must have an opportunity to confer with the attorney and to have

him present during any subsequent questioning. [Obviously this was not done, as no attorney was made available, and yet interrogation continued].

II.

THERE WAS NO VALID WAIVER OF THE RIGHT TO COUNSEL, UNDER EITHER *EDWARDS V. ARIZONA* OR PRIOR AUTHORITY.

In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, the court ruled inadmissible a confession obtained from a suspect at a second interrogation following a request for counsel. In *Edwards* it is significant that the second and pivotal interrogation was preceded by a set of fresh *Miranda* warnings. *Edwards* at 479.

Edwards begins by reviewing *Miranda* and some of its progeny. Perhaps the clearest statement relating to the principle at stake can be found in *Edwards, supra,* at 485.

> *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." (Citations omitted) Our later cases have not abandoned that view. In *Michigan v. Mosley,* 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogations cease until an attorney was present only if the individual stated that he wanted counsel. (Citations omitted) In *Fare vs. Michael C., supra,*

> at 719, 61 L.Ed.2d 197, 99 S.Ct. 2560, the Court referred to *Miranda's* "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island v. Enis*, 446 U.S. 291, 298, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Edwards did not establish a new constitutional rule of criminal procedure, such as *Miranda* did. Instead, *Edwards* simply is an example of the application of *Miranda* to a certain discrete fact pattern. If *Edwards* created a per se rule of any sort, it is only that a valid waiver of a request for counsel will not be presumed merely because incriminating statements are elicited at a second interrogation even though preceded by fresh *Miranda* rights. It appears in *Oregon v. Bradshaw*, 103 S.Ct. 2830 (1983), that a majority of this Court viewed *Edwards* as having created a type of per se rule. However, we believe that it is so clearly built upon the holding of *Miranda, supra*, that it is not the sort of rule which should be given anything other than full retroactive application (See part III of this argument).

In *People v. Paintman*, 315 N.W.2d 418 (Mich. 1982), Cert. den. 73 L.Ed.2d 1292, the Michigan Supreme Court had occasion to consider the implications of *Edwards v. Arizona, supra*. In that case the Michigan Supreme Court expressed the view that *Edwards* did not announce a new

the "knowing and intelligent relinquishment or abandonment of a known right or privilege," see *Edwards, supra* at 482, it is clear that the District Court did not engage in a discrete inquiry in that regard. (Joint Appendix 71-72) Furthermore, constitutional standard in these words:

> The Edwards Court took pains to establish that it was not announcing new law, but only clarifying further the dictates of existing law.
>
> "Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda v. Arizona, supra,* we reverse the judgment * * *." (Emphasis added.) *Edwards,* 451 U.S. at 480, 101 S.Ct. at 1882.
>
> The Court later recited a parade of cases that supported the proposition of *Miranda* that "the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present' ".
>
> The Court concluded the discussion by noting that "[w]e reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel". Id., 485, 101 S.Ct. at 1885.
>
> *People v. Paintman, supra,* at 422.

It seems clear that the pattern of interrogation in this case was wholly at odds with the plain teaching of *Miranda,* and that no valid waiver of the right to counsel occurred here. It can at least be said in *Edwards* that fresh *Miranda* rights were given; in this case, no such admonitions were given before the second phase of interrogation, at which the first incriminating statement was allegedly made.

The District Court in this matter misapprehended the stan-

dard for considering whether an individual has validly waived the right to counsel. The District Court in its opinion held that the statements given "were voluntary and not the product of coercion." While the District Court cited cases establishing to the extent that the District Court reviewed the totality of the circumstances, many of its factual conclusions seem at best "strained." (Joint Appendix 68-71) Even the Eight Circuit took pains to respectfully disagree with the District Court on the facts.

In the view of the respondent one need not reach the question of whether *Edwards* should be applied retroactively. *Edwards* did not create a new constitutional rule of criminal procedure. Further, one need not rely on *Edwards* to uphold the decision of the Eighth Circuit in the court below. The important distinction between *Edwards* and this case is that here the second interrogation was not preceded by fresh *Miranda* warnings.

The following quotation from *People v. Paintman, supra,* at 422, eloquently states the situation:

> Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim.
>
> *Miranda* becomes meaningless rhetoric in the face of a request for counsel that matures only in form but not in substance.
>
> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda,* 384 U.S. at 476, 86 S.Ct. at 1629.

III.

EDWARDS V. ARIZONA SHOULD BE APPLIED IN THIS CASE.

The point has already been made in this brief that *Miranda, supra,* itself established the correct police response to a request for counsel. That response should be the cessation of all interrogation. *Miranda, supra,* at 474. That response should preclude further interrogation until counsel has been made available to the suspect.

We respectfully submit that there is *no* sensible argument that can be made to support the contention that the police interrogation in this case was consistent with *Miranda, supra.* It seems so obvious that we hestiate to put to paper the observation that the police in this case appear to have flagrantly ignored the crystal clear teachings of *Miranda, supra.*

In *Brown v. Louisiana,* 447 U.S. 323 (1980), the Court indicated that three factors would be considered in deciding whether to give retroactive application to a new constitutional doctrine. The factors are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Brown, supra* at 328.

It seems clear that *Edwards v. Arizona, supra,* directly affects the right counsel. Furthermore, the right to counsel may well be crucial to an accused ultimately receiving a fair trial. *See, e.g. Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). To paraphrase from *Brown, supra,* the right to counsel "is a fundamental right, essential for preventing miscarriages of

justice and for assuring that fair trials are provided for all defendants." *Brown, supra,* at 330.

Respondent believes the state in this matter cannot rationally argue that a consideration of the second factor weighs in favor of the state's position. The same can be said of the third factor. To argue that the retroactive application of *Edwards, supra,* either in general or on same basis in this case, would adversely affect the administration of justice in a substantial way is to acknowledge widespread police conduct at odds with *Miranda.* To view the matter another way, had the detectives in this case followed the "old standard," *Miranda,* and refrained from a second interrogation without benefit of advice of *Miranda* rights, and a second and third interrogation without honoring a plea for counsel, in all likelihood we would not be in court today. Not only did the detectives not rely on the "old standard," they ignored it, just as they ignored the repeated request by respondent that he be free from interrogation until he had consulted with his retained attorney.

The discussion previously in this brief regarding *People v. Paintman, supra,* is applicable also at this point, as in *Paintman* the Michigan Court found it unnecessary to apply traditional retroactivity principles to *Edwards.*

Respondent believes that the facts in this case mandate the application of *Edwards, supra.* To do otherwise is to give a stamp of approval to conduct such as occurred in this interrogation.

The respondent in this case did not initiate the second interrogation session. There is no serious dispute about that. The respondent did not initiate the third interrogation in the police car. There is no serious dispute about that. The petitioner does claim that when respondent is alleged to have said, "taking a human life is so useless," he initiated further

conversation with the police. The Eighth Circuit did not agree, viewing the entire day in the car as a single session. We submit such was a correct decision.

It is therefore plain that under *Edwards, supra,* the alleged incriminating statements must be held to be inadmissible. Viewed in one way, it can be argued that the application of *Edwards* to this case demonstrates the possible futility of focusing on the "initiation" question, at all. Here we had a situation in which the dtectives by the nature of the situation were going to spend several uninterrupted hours with the suspect. Unless no one is to speak at all, it is obvious that "conversation" will occur which seen in isolation may be said to have been "initiated" by one party or the other. But that analysis does not seem very helpful. It may be more useful to see which party initiated the overall setting in which the alleged conversations occurred. In this case there is no doubt but that each session was sought and initiated by the police, not by the respondent. This was not a situation in which a suspect sought out the detectives in order to make a statement. Instead, it is a situation in which the detectives doggedly pursued a course of interrogation over two days and many hours, having turned a deaf ear to a specific request for counsel. No valid waiver occured in this case.

CONCLUSION

The second phase of the interrogation violated *Miranda* for at least two reasons: respondent's request to consult his attorney was not honored, and no fresh *Miranda* warnings were given. The District court so held. It was this interrogation which allegedly resulted in the first incriminating statement.

The third phase of interrogation was also unlawful because of non-compliance with respondent's request to consult his retained attorney, and because this phase was built upon and depended for its foundation on the incriminating statement allegedly obtained in the unlawful second interrogation.

Respondent believes that this court can affirm the court below without deciding if *Edwards, supra,* is to be applied retroactively, on the basis of *Miranda,* and those cases which followed it. If, however, the application of *Edwards* is necessary in order to affirm the Eighth Circuit, respondent believes *Edwards* does not create a new constitutional rule of criminal procedure, and therefore the question of retroactivity need not be addressed.

Should the court hold that the retroactivity question must be addressed, respondent believes retroactive application of *Edwards* is called for in this case because the police conduct was so plainly and substantially at variance with the clear dictates of *Miranda* itself. The detectives paid only "lip-service" to the rights guaranteed by the holding of *Miranda.* They said one thing (you have the right to consult your attorney), and did another.

The respondent respectfully requests that the decision below be affirmed, and that the District Court be directed to forthwith order the release of respondent. In the alternative, should the court hold that the Eighth Circuit cannot be

affirmed, respondent respectfully requests that the matter be remanded for further proceedings to consider whether the result of the unlawful second interrogation tainted the third interrogation.

Respectfully Submitted,

/s/Timothy J. McGreevy
Dana, Golden, Moore & Rasmussen
131 North Main Avenue
Sioux Falls, South Dakota 57102
(605) 336-1730

Court-appointed Counsel for Respondent